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UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA DIVISION 3

E. MARK MOON and LORI H. MOON)	Chapter 11
)	
Plaintiffs,)	Bankruptcy No. 20-30711
)	
v.)	Adversary No. 20-03117
)	
MILESTONE FINANCIAL, LLC, a California)	REPLY TO OBJECTIONS TO
Limited Liability Company, WILLIAM R.)	PROPOSED JUDGMENT
STUART, BEAR BRUIN VENTURES, INC. a)	
California Corporation)	
)	
Defendants.)	Date: May 27, 2022
)	Time: 10:30

INTRODUCTION

As directed by the Court's May 14, 2022 Order, Mr. McDonnell prepared a proposed judgment form and submitted it to Mr. Cohen. Mr. Cohen argued that the 7% interest charge should continue past the entry of judgment, and up until the Milestone debt is paid in full. Mr. McDonnell agreed to this, modified the proposed judgment and sent Revision 1 to Mr. Cohen.

Mr. Cohen then sent Mr. McDonnell *his* form of proposed judgment. McDonnell incorporated some of the clarifying language Mr. Cohen wanted, but did not incorporate items Mr. Cohen demanded that were inconsistent with the Court's April 27, 2022 Order (Docket entry #81).

1 Mr. McDonnell then sent Mr. Cohen Revision 2 of the proposed judgment. Mr. Cohen did not
2 approve the proposed judgment.

3 Despite the clear order in the May 13, Docket Order, that Plaintiffs prepare the form of
4 judgment, Mr. Cohen apparently believes that *he* is authorized to prepare the form of judgment and
5 that Plaintiff (and the Court?) must agree to everything he wants.

6 Mr. McDonnell has submitted Revision 2 of the proposed judgment to the court. Plaintiff
7 requests that this judgment be entered, and then, if the parties can not agree on an amount of
8 attorneys fees, Plaintiffs will make a motion for fees.

9 **1. Mr. Cohen agreed to the amounts in the proposed judgment; in fact, he calculated**
10 **them.**

11 The Court's April 27, 2022 Order included the amounts in the first five lines of the table on
12 page two of the Proposed Order. The April 27 Order directed that parties, "determine the amount
13 owed by Plaintiffs according to the spreadsheet previously provided by Milestone at Docket 76,
14 Ex.1." Mr. Cohen then prepared an update to that earlier Milestone spreadsheet. The parties
15 determined what additional payments had been made by Mr. Moon, and Mr. Cohen inserted these
16 into his spreadsheet and asked Mr. McDonnell to agree that the numbers were correct. McDonnell
17 agreed that the spreadsheet was correct and that the amount of post-maturity interest owed by
18 Plaintiff to Milestone was the \$143,018.85 listed in Mr. Cohen's spreadsheet. Mr. McDonnell
19 incorporated that number into the chart in the proposed judgment. Does Mr. Cohen now wish to
20 prove that his own number is wrong?

21 In a May 13 e-mail to Mr. Cohen, Mr. McDonnell advised Mr. Cohen that McDonnell
22 would include following statement in his Status Conference Statement.

23 "The parties have stipulated that the amount owed to Milestone as of May 13,
24 2022 is \$751,002.91

25 Mr. Cohen did not object to that amount. The parties agreed on the amount that should be in
26 the proposed judgment is \$751,002.91. Mr. Cohen's objection is that he is not stipulating that the
27 Court's ruling is *correct*. That is never the case. The procedure is that the defendant is approving
28 the proposed judgment *only* "as to form." Mr. McDonnell included the word "stipulated" because it

1 was accurate, and because Mr. McDonnell believed it was important that the Court know the parties
2 agreed to these numbers in writing. If the Court prefers the words “determined” or “agreed,”
3 Plaintiff has no objection.

4 **2. The Moons are the prevailing party.**

5 In a prior e-mail exchange, Mr. notified Mr. Cohen that the following language would be put
6 into the Plaintiff’s May 13, Status Conference statement:

7 “Plaintiffs are willing to dismiss all remaining claims provided the judgment
8 provides that Plaintiff shall have judgment on the Second Cause of Action, breach
9 of contract. Plaintiffs’ Motion for Partial Summary Judgment (Docket #36]
10 requested at page 16 that the court rule: “That the 10% acceleration penalty in the
11 amount of \$115,615.06 is an illegal penalty that Milestone can not collect, and that
12 the demand for payment of this illegal penalty as part of the payoff quote was a
13 breach of contract.” The court has ruled that the 10% acceleration charge was
14 illegal, so Plaintiffs should have judgment on the Second Cause of Action.

15 The court should enter judgment consistent with its April 27 order, and
16 adding judgment for Plaintiffs on the Second Cause of action.”

17 The Court accepted this submission as the basis for its May 13, 2022 Order that no further
18 proceedings were needed in the case.

19 The first ruling in the Court’s April 27, 2020 Order on the motions stated, at page 9,

20 “The Moon MSPJ is GRANTED on the usury claim and on the claim
21 regarding the 10% acceleration charge on the balloon payment.”

22 Because the Moons prevailed on these two claims, they also prevailed on the Second Cause
23 of Action for Breach of Contract. As prevailing party on the contract, the Moons are entitled to an
24 award of attorneys fees under Cal. Civil Code §1717.

25 **3. The Moons are entitled to judgment on the usury claim.**

26 As pointed out above, the Court held that “The Moon MSPJ is Granted as to the usury
27 claim...” When a Motion for Partial Summary Judgment is granted, that partial judgment becomes
28 part of the final judgment. There is no procedural barrier to issuing the final judgment. California
law always permits a party to amend its pleadings to conform to proof. *Genger v. Albers* (1949) 90
Cal.App.2d 52, 55. In Federal Court, the rules are even broader. FRCP 15(b) provides for
amendments to conform to proof at trial, or even after judgment. Rule 15(c) further provides:

When an issue not raised by the pleadings is tried by the parties’ express or
implied consent, it must be treated in all respects as if raised in the pleadings. A

1 party may move—at any time, even after judgment— to amend the pleadings to
2 conform them to the evidence and to raise an unpleaded issue. But failure to amend
does not affect the result of the trial of that issue.

3 The usury issue was fully litigated by the parties. No amendment is needed.

4 **4. There is no ambiguity in the proposed judgment.**

5 Defendant's objection number 4 is a bit confusing. The first sentence quotes part of the
6 proposed judgment out of context to try to create a non-existent ambiguity.

7 The proposed judgment states that Milestone is entitled to 7% post-maturity interest up to
8 the time that the obligation is finally paid off. The proposed judgment incorporates the *deadline* set
9 by the Court in its April 27, 2022 Order. The proposed judgment states that Plaintiff must tender the
10 full amount owed by June 24, 2022, or the Defendant may move for relief from stay.

11 **5. The fifth objection raises a non-existent problem.**

12 The prior order and the proposed judgment require that the Moons pay the full debt by June
13 24. Objection 5 wonders; what if the Moons do not pay by June 24 and Milestone has to advance
14 some money after that? Well, in the unlikely event that that does occur (the Defendant's spreadsheet
15 shows that the Moons have not missed a property tax or insurance payment since October 2019),
16 then any further Milestone payments would become part of its motion for relief from stay.

17 **6. Again, the Moons are the prevailing party.**

18 Objection 6 merely repeats the fact that Milestone does not like the fact that the Moons are
19 the prevailing party on the contract. This is rebutted at #2, above.

20
21 Respectfully submitted,

22
23 Date: May 19, 2022

24 /s/ John McDonnell
John P. McDonnell, Esq.
25 Attorney for Plaintiffs
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